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In the Supreme Court of the United States

OCTOBER TERM, 1984

MOBIL OIL CORPORATION, PETITIONER

v.

JERRY A. BLANTON, ROY H. HEALEY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the court of appeals' erroneous statement that a relevant market finding is not necessary to establish an attempt to monopolize under Section 2 of the Sherman Act warrants this Court's review of the court of appeals' judgment upholding a jury verdict for respondents where the jury found that petitioner had attempted to monopolize a specified relevant market and the court of appeals concluded that petitioner "[h]ad pointed to nothing in the record that would lead [the reviewing court] to question the jury's factual finding."

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This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. Respondents Blanton and Healey formerly leased and operated Mobil service stations in the Seattle, Washington area. They sued petitioner Mobil Oil Corp. (Mobil) seeking damages for alleged violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1 and 2, and Section 3 of the Clayton Act, 15 U.S.C. 14.[1] By special verdict, the jury found that Mobil had subjected Blanton and Healey to an

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[1]They also alleged fraud, breach of contract and violation of Washington's Franchise Investment Protection Act (FIPA), Wash. Rev. Code Ann. § 19.86.010 *et seq.* (1978). The district court granted a directed verdict in favor of Mobil on the FIPA claim (Pet. App. A2).

unlawful tying arrangement in violation of Section 1 of the Sherman Act and Section 3 of the Clayton Act, and that Mobil had subjected Blanton to coerced resale price maintenance and a group boycott. Pet. App. A2-A6. The jury also found that Mobil had attempted to monopolize "a relevant submarket consisting of sales of 'Mobil-branded and non-Mobil-branded oil, lubricants, and TBA&S [tires, batteries, accessories and specialty items] to Mobil dealers.' " *Id.* at A10.[2] Damages resulting from this attempted monopolization were assessed at $134,585 for Blanton and $19,967 for Healey. *Id.* at A2.[3] The district court trebled the damages upon entry of judgment. E.R. 237-238.

2. Mobil appealed the attempted monopolization award, and the Ninth Circuit affirmed.[4] The court of appeals rejected Mobil's contention that there was reversible error in the jury's relevant submarket finding.[5] The existence of a

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[2]The jury found that there also existed a relevant market "for the sale of any and all oil, lubricants and TBA&S to gasoline station dealers" but that Mobil had not monopolized or attempted to monopolize that market. E.R. 243. "E.R." refers to the Excerpt of Clerk's Record in the court of appeals.

[3]The jury found "$0" damages from the other antitrust violations but it indicated that damages resulting from those violations were included in the attempted monopolization verdict. The jury also found that Blanton had suffered $94,628 and Healey $11,144 in non-antitrust damages. Pet. App. A2.

[4]Mobil also appealed the contract-fraud awards. Blanton and Healey cross-appealed the directed verdict in favor of Mobil on the FIPA claim. The court of appeals reversed and remanded both the contract-fraud and the FIPA judgments (Pet. App. A3, A27). Those issues are not presented in the petition for a writ of certiorari.

[5]Mobil made two other arguments in its antitrust appeal: It argued that the special verdicts with respect to damages were inconsistent, and that Blanton and Healey had failed to prove causal antitrust damages. The court of appeals rejected both these arguments, and Mobil does not raise either of them in this Court.

particular market, the court held, is an issue of fact, and "Mobil has pointed to nothing in the record that would lead us to question the jury's factual finding." Pet. App. A11. Because Mobil had not challenged the sufficiency of the evidence as such, the court concluded that Mobil was "apparently ask[ing the court] to rule as a matter of law that a relevant submarket cannot consist of sales to dealers licensed by a common oil company." *Ibid.* The court declined to resolve this "legal question," however, "because it is clear that the jury's attempted monopolization finding may be sustained under *Lessig* v. *Tidewater Oil Co.*, 327 F.2d 459 (9th Cir.), *cert. denied*, 377 U.S. 993 * * * (1964), and its progeny." Pet. App. A11. Under what the court referred to as the "modified *Lessig* doctrine," it stated (*id.* at A12):

> We cannot reverse the jury's finding of attempted monopoly by reason of its definition of the relevant market because the jury's finding of *per se* violations of the Sherman Act makes the relevant market finding unnecessary to establish liability.

DISCUSSION

The court of appeals' discussion of attempted monopolization is inconsistent with the rationale of decisions of this Court and of other courts of appeals. Nonetheless, the United States does not believe that further review is warranted.

There are, to be sure, serious flaws in the court of appeals' opinion. Particularly at odds with established principles are the court's statements that, on the facts of this case, there was no need to define a relevant market before imposing liability under Section 2 (15 U.S.C. 2) and that, under the Ninth Circuit's "*Lessig* rule," a plaintiff may establish attempted monopolization without proving that actual monopolization is the probable result. Moreover, the *Lessig* rule reflects a misunderstanding of the Sherman Act's

"basic distinction between concerted and independent action." *Copperweld Corp.* v. *Independence Tube Corp.*, No. 82-1260 (June 19, 1984), slip op. 12, quoting *Monsanto Co.* v. *Spray-Rite Service Corp.*, No. 82-914 (Mar. 20, 1984), slip op. 6.

The case does not, however, merit review at this time. In this case, as in several other Ninth Circuit decisions that cite *Lessig* v. *Tidewater Oil Co.*, 327 F.2d 459, cert. denied, 377 U.S. 993 (1964), the *Lessig* rule was not the only, or even the primary, basis for decision. Here, the jury was not instructed, and did not find liability, in accordance with *Lessig*; to the contrary, the district court instructed (Br. in Opp. App. a2) that in order for respondents to prevail on their attempted monopolization claim, the jury must find "a dangerous probability that [petitioner] will achieve a monopoly of the relevant market" (*id.* at a3). In response to special interrogatories, the jury found that a specific relevant market existed and that Mobil had attempted to monopolize that market. On appeal Mobil "pointed to nothing in the record that would lead [the court] to question the jury's factual finding" (Pet. App. A11). Accordingly, the court of appeals' judgment could be affirmed on the basis of the findings of fact in which both lower courts concurred.

1. A dangerous probability of successful monopolization of a relevant market is an essential element of the offense of attempted monopolization under Section 2 of the Sherman Act. This Court has specifically stated that "[t]o establish * * * attempt to monopolize * * * it [is] necessary to appraise the exclusionary power * * * in terms of the relevant market." *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.*, 382 U.S. 172, 177 (1965). Moreover, the Court noted last Term that "[t]he conduct of a single firm * * * is unlawful only when it threatens actual monopolization" (*Copperweld Corp.* v. *Independence Tube Corp.*, slip op. 12-13). All courts of appeals, other

than the Ninth Circuit, are in accord in holding that proof of dangerous probability of monopolization of a relevant market is required in order to establish an attempt to monopolize.[6]

These holdings reflect the " 'basic distinction between concerted and independent action' " under the Sherman Act. *Copperweld*, slip op. 12, quoting *Monsanto Co.* v. *Spray-Rite Service Corp.*, slip op. 6. Concerted action is illegal under Section 1 if it constitutes an unreasonable restraint of trade. But single firm action that creates a similar restraint "is not enough" to establish liability under Section 2, which alone governs single firm conduct. *Copperweld*, slip op. 13. Unless it threatens to create a monopoly, a single firm's conduct does not violate the Sherman Act.

There are sound and "readily appreciated" reasons for this statutory distinction between concerted and unilateral activity, *Copperweld*, slip op. 14:

> Concerted activity inherently is fraught with anticompetitive risk. It deprives the marketplace of the

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[6]See, *e.g.*, *George R. Whitten, Jr., Inc.* v. *Paddock Pool Builders, Inc.*, 508 F.2d 547, 550 (1st Cir. 1974), cert. denied, 421 U.S. 1004 (1975); *Nifty Foods Corp.* v. *Great Atlantic & Pacific Tea Co.*, 614 F.2d 832, 841 (2d Cir. 1980); *Berkey Photo, Inc.* v. *Eastman Kodak Co.*, 603 F.2d 263, 271-275 (2d Cir. 1979), cert. denied, 444 U.S. 1093 (1980); *Harold Friedman, Inc.* v. *Kroger Co.*, 581 F.2d 1068, 1069 (3d Cir. 1978); *White Bag Co.* v. *International Paper Co.*, 579 F.2d 1384, 1387 (4th Cir. 1974); *Spectrofuge Corp.* v. *Beckman Instruments, Inc.*, 575 F.2d 256, 276 (5th Cir. 1978), cert. denied, 440 U.S. 939 (1979); *United States* v. *Dairymen, Inc.*, 660 F.2d 192, 194 (6th Cir. 1981); *Lektro-Vend Corp.* v. *Vendo Co.*, 660 F.2d 255, 270 (7th Cir. 1981); cert. denied, 455 U.S. 921 (1982); *United States* v. *Empire Gas Corp.*, 537 F.2d 296, 298-299, 302-307 (8th Cir. 1976), cert. denied, 429 U.S. 1122 (1977); *E.J. Delaney Corp.* v. *Bonne Bell, Inc.*, 525 F.2d 296, 306 (10th Cir. 1975), cert. denied, 425 U.S. 907 (1976); *Merit Motors, Inc.* v. *Chrysler Corp.*, 417 F. Supp. 263, 269 (D.D.C. 1976), aff'd on other grounds, 569 F.2d 666 (D.C. Cir. 1977).

> independent centers of decisionmaking that competition assumes and demands. In any conspiracy, two or more entities that previously pursued their own interests separately are combining to act as one for their common benefit. This not only reduces the diverse directions in which economic power is aimed but suddenly increases the economic power moving in one particular direction. Of course, such mergings of resources may well lead to efficiencies that benefit consumers, but their anticompetitive potential is sufficient to warrant scrutiny even in the absence of incipient monopoly.

Unilateral conduct that does not threaten actual monopolization, on the other hand, is not subject to the Sherman Act "[i]n part because it is sometimes difficult to distinguish robust competition from conduct with long-run anticompetitive effects." *Copperweld,* slip op. 13. Judging unilateral conduct by the standards of Section 2, which focuses on the threat of monopoly power, "reduces the risk that the antitrust laws will dampen the competitive zeal of a single aggressive entrepreneur." *Copperweld,* slip op. 13.

The danger that monopoly power will result from a course of anticompetitive conduct can be meaningfully evaluated only in the context of a relevant market. Market definition is the process of isolating a product (or group of products) and a geographic area within which a firm could charge a price significantly higher than the price that would prevail if there were multiple competing sellers. If a seller "controls" only a product and geographic area that does not constitute a relevant market, however, an increase in that seller's price will simply cause buyers to shift to other substitute products.[7] Such a seller does not "control price" and,

[7]Similarly, manufacturers of other products that consumers do not view as reasonable substitutes may be willing and able to shift to production of the product "controlled" by the seller. Where such shifts

thus, does not have monopoly power. See *United States* v. *duPont & Co.*, 351 U.S. 377, 379 (1956); *United States* v. *Grinnell Corp.*, 384 U.S. 563, 571 (1966).[8]

2. More than 20 years ago, before this Court's decisions in *Walker Process* and *Copperweld,* the Ninth Circuit "reject[ed] the premise that probability of actual monopolization is an essential element of proof of attempt to monopolize." *Lessig* v. *Tidewater Oil Co.*, 327 F.2d 459, 474 (1964). It added that: "When the charge is attempt (or conspiracy) to monopolize, rather than monopolization, the relevant market is 'not in issue.' " *Ibid.*

The Ninth Circuit provided no economic justification for these statements. Moreover, the authorities on which *Lessig* relies provide no support for the conclusions the court reached. The opinion in *Lessig* quotes (327 F.2d at 474) a footnote from this Court's opinion in *duPont* (351 U.S. at 395 n.23) for the proposition that market definition is " 'not in issue.' " This Court's comment in that footnote, however, was not directed to the legal proposition the Ninth Circuit adopted. To the contrary, the *duPont* opinion extensively discussed the concept of relevant market as it applied in proving monopolization. The quoted footnote merely described the opinion in *Story Parchment Co.* v. *Paterson Co.*, 282 U.S. 555 (1931), and, in so doing, stated factually

can occur relatively quickly (*i.e.*, within 12 months), that manufacturing capacity prevents the exercise of monopoly power and should be included in the relevant market. See *Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U.S. 320, 331-333 (1961); U.S. Dep't of Justice, *Merger Guidelines* § 2.21 (June 14, 1984).

[8]Although market share is often the best evidence of the likelihood of successful monopolization, high market share does not always indicate a dangerous probability. Ease of entry into the market, rapidly changing technology, and other conditions may make it inappropriate to infer dangerous probability from market share alone. See, *e.g.*, *White & White, Inc.* v. *American Hospital Supply Corp.*, 723 F.2d 495 (6th Cir. 1983).

that in that case "the scope of the market was not in issue." This was not a description or adoption of a legal principle at all, but was merely an accurate recitation of the facts and procedural posture of a particular case.[9] Indeed, this Court's opinion in *Story Parchment* reveals that while the parties did not challenge the market definition in this Court — and hence it was "not in issue" — the case had nonetheless been litigated with the confines of a relevant market in mind. See 282 U.S. at 559 ("This is an action * * * to recover damages resulting from an alleged conspiracy * * * to monopolize interstate trade and commerce in vegetable parchment.").[10]

The second stated source for the *Lessig* rule is equally unavailing to support the Ninth Circuit's conclusion. In *Lessig* the court of appeals (327 F.2d at 474 n.46) read this Court's reference in *Swift & Co.* v. *United States,* 196 U.S. 375, 396 (1905) to "intent and the consequent dangerous probability" as establishing that dangerous probability may be inferred merely from intent. The court of appeals thus placed upon the word "consequent" more weight than its context in *Swift* will bear. Justice Holmes' opinion for the Court in *Swift* states (*ibid.*) that intent is essential to prove an attempt to monopolize and that "[w]here acts are not sufficient in themselves to produce a result which the law

[9]In any event, *Story Parchment* was, as the Court stated in *duPont* (351 U.S. at 395 n.23), "based on proven allegations of combination and conspiracy to monopolize." It was, therefore, a case that involved concerted rather than unilateral conduct.

[10]Moreover, the opinion of the court of appeals in *Story Parchment* shows that while market definition was not a contested issue on appeal, a market had nonetheless been defined. *Paterson Parchment Paper Co.* v. *Story Parchment Co.*, 37 F.2d 537, 538 (1st Cir. 1930), rev'd, 282 U.S. 555 (1931) (three companies "were the only producers in this country of * * * parchment paper, which is used as a protective wrapper for meats, butter, and other foodstuffs" and they "enjoyed a practical monopoly of the trade in this country").

seeks to prevent — for instance, the monopoly — but require further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen. *Commonwealth* v. *Peaslee,* 177 Massachusetts 267, 272." The point is simply that intent is an essential element of dangerous probability in this context, as it is of any culpable attempt; not that intent supplants dangerous probability of success.[11] Justice Holmes had earlier explained the rule in his opinion for the Supreme Judicial Court of Massachusetts in *Commonwealth* v. *Peaslee,* 177 Mass. 267, 272, 59 N.E. 55, 56 (1901):

> That an overt act although coupled with an intent to commit the crime commonly is not punishable if further acts are contemplated as needful, is expressed in the familiar rule that preparation is not an attempt. But some preparations may amount to an attempt. It is a question of degree. If the preparation comes very near to the accomplishment of the act, the intent to complete it renders the crime so probable that the act will be a misdemeanor * * *.

And, in his subsequent opinion dissenting on other grounds in *Hyde* v. *United States,* 225 U.S. 347, 387-388 (1912), Justice Holmes recapitulated the *Swift* formulation in a way that lays to rest the contention that *Swift* can be read to eliminate the need to prove dangerous probability (emphasis added):

> But combination, intention and overt act may all be present without amounting to a criminal attempt — as

[11]The Court stated in *Swift,* 196 U.S. at 402, that determining whether an act "done with intent to produce an unlawful result is unlawful * * * is a question of proximity and degree." Thus, the holding of *Swift* is that the proper inquiry in an attempted monopolization case involves intent *plus* the proximity of the challenged conduct to the harm — monopolization — that Section 2 is designed to prevent.

> if all that were done should be an agreement to murder a man fifty miles away and the purchase of a pistol for the purpose. *There must be dangerous proximity to success.*

3. In its original form, the *Lessig* rule would in particular cases do away with the need to define a relevant market or to prove a dangerous probability of actual monopolization. But, as the panel in this case concluded (Pet. App. A11), "the sweeping language of *Lessig*" has been narrowed by subsequent Ninth Circuit decisions, and that court does "require a showing of a relevant market in circumstances where the conduct of the attempted monopolizer is ambiguous or not clearly predatory." The court (*id.* at A11-A12) found "[t]he current statement of the *Lessig* doctrine" in *Gough* v. *Rossmoor Corp.*, 585 F.2d 381, 390 (9th Cir. 1978), cert. denied, 440 U.S. 936 (1979):

> [I]n the absence of proof of relevant market and market power, the plaintiff must prove either predatory conduct or a *per se* violation of § 1 to prove an attempt to monopolize.

The court of appeals in *Gough* recognized that a plaintiff must prove three elements of attempted monopolization (585 F.2d at 390):

> (1) specific intent to control prices or destroy competition with respect to a part of commerce, (2) predatory or anticompetitive conduct directed to accomplishing the unlawful purpose, and (3) a dangerous probability of success.

But the court added that, in the Ninth Circuit, a "short cut" based on *Lessig* is available to plaintiffs (*ibid.*):

> proof of probability of success can be supplied by inference drawn from proof of specific intent and * * * proof of specific intent can in turn be supplied by

> inference drawn from proof of predatory or anticompetitive conduct which constitutes an unreasonable restraint of trade. [12]

The effect of this Ninth Circuit "short cut" is to eliminate the element of dangerous probability of actual monopolization and, thus, to eliminate the congressionally-mandated distinction between unilateral conduct and concerted action (see pages 4-6, *supra*).[13] That approach is plainly inconsistent with this Court's analysis in *Copperweld* (see pages 5-6, *supra*).

4. Despite the inconsistency of the Ninth Circuit's *Lessig* doctrine with the holdings of this Court and of other courts of appeals, we do not believe that this case is an appropriate vehicle for further review. The case was not tried in the district court under the *Lessig* rule, and the jury's relevant market finding was upheld by the court of appeals. Moreover, although *Lessig* and its progeny are an unfortunate source of confusion in the Ninth Circuit, we see no

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[12]It is not clear from the Ninth Circuit's decisions what constitutes "predatory conduct," but *Gough* (585 F.2d at 390) strongly suggests that any "unreasonable restraint of trade" imposed by a single firm would be sufficient to eliminate the requirement that dangerous probability be proved.

[13]The short-cut is not based on any assumption that particular types of conduct are so likely to lead to monopoly that it is unnecessary to prove dangerous probability in each case. To the contrary, the Ninth Circuit's stated purpose is to apply Section 2 to impose liability on unilateral anticompetitive conduct by firms that are " 'not dangerously close to monopoly power.' " 585 F.2d at 390 n.13, quoting *Greyhound Computer Corp.* v. *International Business Machines Corp.*, 559 F.2d 488, 504 (9th Cir. 1977), cert. denied, 434 U.S. 1040 (1978). See also, *e.g.*, *William Inglis & Sons Baking Co.* v. *ITT Continental Baking Co.*, 668 F.2d 1014, 1029 (9th Cir. 1981)) (as amended), cert. denied, 459 U.S. 825 (1982) ("the dangerous probability of success requirement is not designed as a means of screening out cases of minimal concern to antitrust policy but is instead a way of gauging more accurately the purpose of a defendant's actions").

sufficient basis in this case for departure by this Court from its usual practice of not considering cases in which an alternative ground adequately supports the judgment below.

a. The jury's verdict was not based on a *Lessig* theory that dangerous probability of successful monopolization may be inferred merely from intent or particular conduct. The jury was instructed (Br. in Opp. App. a2) that:

> An attempt to monopolize has three elements: (1) specific intent to monopolize; (2) some act or acts done in furtherance of an intent to monopolize; and (3) which although insufficient to actually produce monopoly power creates a dangerous probability that the defendant will achieve a monopoly of the relevant market.

The jury also was given a detailed instruction regarding relevant market and its relationship to monopoly power (*id.* at a1-a2). At Mobil's request, the jury was further instructed that Mobil's "natural monopoly over [its] own products" was not in itself an antitrust violation.[14]

Petitioner's objections to the monopolization and attempted monopolization instructions did not include a specific request for any additional instructions on relevant market or attempted monopolization.[15] Moreover, the

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[14]Instruction No. 31, as given to the jury, stated:

> A manufacturer has a natural monopoly over his own products, especially when these products bear the manufacturer's trademark, and, standing alone, that is not an antitrust violation. You are instructed that unless you find that Mobil used its natural monopoly in its own products to gain monopoly control of the market in which its products compete, it is not an antitrust violation.

[15]In addition to objecting to all instructions on the ground that a directed verdict should be entered in its favor, Mobil objected to the monopolization and attempted monopolization instructions on essentially three grounds: (i) that the instructions were "unnecessary and misleading"; (ii) that "a manufacturer has a natural monopoly over its own products, and there is no violation of law unless defendant uses such natural monopoly to gain monopoly control of the overall market in which its products compete"; and (iii) that submarket analysis applies only in cases arising under Section 7 of the Clayton Act rather than Section 2 of the Sherman Act (Objections to Court's Instructions at 3).

The first objection is too vague to satisfy the requirements of Fed. R. Civ. P. 51. The second is, in effect, a request for an instruction (No. 31) that was given (see note 14, *supra*). The third fails to recognize that in cases arising under Section 7 of the Clayton Act, as well as in those arising under Section 2 of the Sherman Act, the relevant market is generally the smallest market within which market power may be exercised, although other, broader markets may exist. See *Merger Guidelines, supra,* § 2.11, at 4; *United States* v. *Dairymen, Inc.*, 660 F.2d 192 (6th Cir. 1981). In any event, Mobil did not object to the court's failure to give additional instructions on market definition or attempt to monopolize.

substance of the instructions was a proper statement of the relevant law. Although respondents had requested an instruction based on *Lessig*, stating that specific intent could be inferred from per se violations of the Sherman Act, no such instruction was given.

The jury must be presumed to have followed the instructions that were given by the court. *Opper* v. *United States*, 348 U.S. 84, 95 (1954); *Watkins* v. *Sowders*, 449 U.S. 341, 347 (1981). And it was on the basis of these instructions that the jury found that Mobil had attempted to monopolize the market or submarket "for the sale of Mobil-branded and non-Mobil-branded oil, lubricants, and TBA&S to Mobil dealers" (Pet. App. A10). Accordingly, the attempted monopolization verdict was based on findings of dangerous probability of monopolization in a relevant market. And, the court of appeals specifically ruled that on appeal Mobil had "pointed to nothing in the record that would lead [the court] to question the jury's factual finding" (*id.* at A11). The Ninth Circuit's *Lessig* discussion therefore was not necessary to its affirmance of the jury's verdict.

b. Mobil's petition for a writ of certiorari fails to show that the decision below rests on the *Lessig* doctrine. Mobil does not specifically challenge the jury instructions nor does it explicitly attack the sufficiency of the evidence to support the jury's relevant market finding. Rather, Mobil asserts (Pet. i, 9) that the decision below must rest on the *Lessig* holding because the relevant market found by the jury is "a market which cannot constitute a relevant market under the federal U.S. antitrust laws." Petitioner also argues (*id.* at 11) that there was legal error below in that "the relevant market must be defined to include sales of all interchangeable products to similarly situated dealers with whom the Mobil dealers compete."

Mobil's argument is essentially that non-Mobil dealers sell products that retail consumers consider interchangeable with Mobil's and that within a given geographic area these dealers are necessarily part of any relevant market that includes the Mobil dealers (see Pet. 10-11). In support of this assertion, Mobil cites cases (Pet. 6-7; Reply Br. 3 n.2) holding that, on the facts before those courts, the relevant market was not shown to be limited to the products of a single company.[16] Those cases are not controlling here, however. As the court of appeals in this case recognized, market definition is an issue of fact.[17] While the factors

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[16]The market found by the jury in this case was not limited to sales of Mobil-branded products, nor, as Mobil suggests in its petition (Pet. 10), was the market restricted to sales by Mobil. See Pet. App. A10 n.4.

[17]See, *e.g.*, *International Boxing Club* v. *United States*, 358 U.S. 242, 251 (1959) (district court's finding of relevant market must be upheld because it was not "clearly erroneous"); *Telex Corp.* v. *International Business Machines Corp.*, 510 F.2d 894, 915 (10th Cir.), cert. dismissed, 423 U.S. 802 (1975) ("plain error" in lower court's market definition); *Spectrofuge Corp.* v. *Beckman Instruments, Inc.*, 575 F.2d 256, 276 (5th Cir. 1978) (court reviewed evidence to determine whether it was sufficient to support jury's verdict); *Martin B. Glauser Dodge Co.* v. *Chrysler Corp.*, 570 F.2d 72, 82 n.18 (3d Cir. 1977), cert. denied, 436 U.S. 913 (1978) (relevant market is a question of fact for the jury).

considered in other cases are relevant in determining whether a court has applied the correct legal standard in making findings in a non-jury case or in instructing a jury, a factual finding based on a particular record is not controlling in a different case involving different parties.

The jury in this case found a market, consisting of sales of Mobil-branded and non-Mobil-branded TBA&S to Mobil dealers. Such a market may be unusual, but it is not inconceivable, nor is its existence precluded by any other finding made by the jury.[18] The court of appeals held that the record supported the jury's relevant market finding, and this Court

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[18]Mobil appears to argue that the market found by the jury cannot constitute a relevant market because, as far as the ultimate consumers are concerned, Mobil's products are functionally interchangeable with products of other companies. Functional similarities or differences in products are a factor in defining the relevant market. *Merger Guidelines, supra*, § 2.12; *United States* v. *duPont & Co.*, 351 U.S. at 393-404. But there are other factors that determine "how far buyers will go to substitute one commodity for another." *United States* v. *duPont & Co.*, 351 U.S. at 393. See *Merger Guidelines, supra*, § 2.21. Thus even products that are functionally interchangeable from an objective standpoint may not be in the same market. For example, customers may perceive sufficient differences that they will not substitute one for the other in the face of a small but significant increase in price, or the products may be purchased as part of different packages of goods and services for which the cost of those products is a relatively insignificant part of the total cost.

For these or other reasons, Mobil dealers might have been able to pay more for TBA&S than were other dealers who bought "functionally similar" products. Thus, the relevant market could have been limited to TBA&S sales to Mobil dealers if, for example, those dealers were subjected to price discrimination. Sellers engage in price discrimination in an economic sense if they sell at two different prices to two groups of customers as to whom the sellers' costs are equal. Where price discrimination is possible, a seller can profitably impose a "small but significant and nontransitory" increase in the price of its products to a group of buyers who cannot easily substitute, while selling at a lower price to another group of buyers who are more price-sensitive. In such situations, it is appropriate to view each of the two groups of buyers as a

customarily defers to the courts of appeals on such evidentiary issues rather than undertaking its own examination of the record.[19]

c. This case does not appear to be one in which the Court should depart from its normal practice and consider an issue that would not affect the outcome of the case. The *Lessig* doctrine is obviously erroneous, but there appears to be little risk that any of the other courts of appeals will follow the Ninth Circuit's approach in attempted monopolization cases. Indeed, most other circuits expressly have declined to follow *Lessig* and its progeny.[20] Moreover, even within the Ninth Circuit the continuing impact of *Lessig* is difficult to ascertain. That court rarely relies on *Lessig* as the sole ground for decision in Section 2 attempt cases. Most plaintiffs who prevail on Section 2 claims apparently

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separate market. See generally, *Merger Guildelines, supra*, §§ 2.13, 2.33.

We express no view on whether the evidence in this case was sufficient to prove a relevant market limited to sales of TBA&S to Mobil dealers; our point is simply that the possibility of such a market cannot be rejected as a matter of law as petitioner contends.

[19]This Court has "frequently noted its reluctance to disturb findings of fact concurred in by two lower courts." *Rogers* v. *Lodge*, 458 U.S. 613, 623 (1982); *Graver Tank & Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275 (1949); *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967).

[20]See, *e.g.*, *Edward J. Sweeney & Sons, Inc.* v. *Texaco, Inc.*, 637 F.2d 105, 117 (3d Cir. 1980), cert. denied, 451 U.S. 911 (1981); *Photovest Corp.* v. *Fotomat Corp.*, 606 F.2d 704, 711-712 (7th Cir. 1979), cert. denied, 445 U.S. 917 (1980); *Spectrofuge Corp.* v. *Beckman Instruments, Inc.*, 575 F.2d at 276 & n.69; *FLM Collision Parts, Inc.* v. *Ford Motor Co.*, 543 F.2d 1019, 1030 (2d Cir. 1976), cert. denied, 429 U.S. 1097 (1977); *E.J. Delaney Corp.* v. *Bonne Bell, Inc.*, 525 F.2d at 305; *George R. Whitten, Jr., Inc.* v. *Paddock*, 508 F.2d at 550; *Agrashell, Inc.* v. *Hammons Products Co.*, 479 F.2d 269, 287 (8th Cir.), cert. denied, 414 U.S. 1022 (1973).

do prove relevant market and dangerous probability;[21] the *Lessig* doctrine endures primarily as an alternative ground for decision. According to petitioner (Pet. 7), this is the first case in which a final judgment awarding treble damages for attempted monopolization has been sustained solely on the basis of *Lessig*. And, as we have shown (see pages 12-13, *supra*), there is an alternative ground even in this case.

This is not to deny that *Lessig* may continue to have serious adverse effects. It may, for example, make it more difficult to dispose of meritless claims by summary judgment, and it may permit district courts in the Ninth Circuit to be less rigorous in assessing the sufficiency of plaintiffs' evidence of relevant market. The presence of alternative grounds in cases purporting to apply *Lessig*, however, tends to undercut petitioner's argument that *Lessig* presents a serious threat of unwarranted treble damage liability.

Despite apparent intracircuit conflicts,[22] and the conflict between the *Lessig* doctrine and decisions of other courts of appeals, the Ninth Circuit has not yet sat *en banc* to review a case involving the *Lessig* doctrine. This may be due in part to the presence of alternative grounds in those panel decisions in which *Lessig* has been cited. Should a case arise in which the *Lessig* doctrine is dispositive, the Ninth Circuit may have an opportunity to resolve the existing conflict. In doing so, it will have the benefit of this Court's opinion in *Copperweld*, which provides an extensive explanation of

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[21]Because of the uncertainty in the application of *Lessig*, a prudent Ninth Circuit plaintiff will attempt to prove relevant market and dangerous probability. Those who are unable to do so have apparently also been unable in most cases to prove the other elements of a Section 2 violation.

[22]As petitioner correctly notes (Pet. 19-21), some Ninth Circuit panels appear to overlook the rule, others appear to require — or at least note the presence of — a showing of dangerous probability and relevant market, still others feel bound to follow *Lessig* although expressing doubts about it.

the Sherman Act's distinction between unilateral and concerted action.[23] Until the Ninth Circuit has resolved its intracircuit conflicts — or at least until it has declined to rehear *en banc* a case that squarely presents the *Lessig* issue — it appears unnecessary for this Court to review a case in which that doctrine provides only an alternative ground for the judgment.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[23] The court of appeals denied Mobil's petition for rehearing en banc on February 21, 1984 — four months before this Court decided *Copperweld*.

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